



**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 1228 of 2017

BETWEEN: ABEL TARI
ELIZABETH TARI
Claimants

AND: TELECOM VANUATU LIMITED
First Defendant

AND: FABRICE AISSAV
Second Defendant

Coram: Justice Oliver A. Saksak

Counsel: Eric Molbaleh for the Claimants
Abel Kalmet and Mark Hurley for First and Second Defendants

Date of Hearing: 7th and 8th September, 2017

Date of Judgment: 26th September 2017

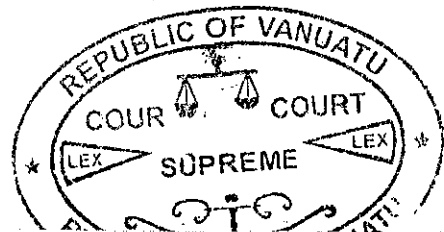
JUDGMENT

Introduction

1. This is a claim by the claimants for damages for injuries and for pains and suffering sustained in a collision involving a bus driven by Abel Tari and a Toyota Double Cabin Hi-Lux vehicle Registered No. 1347 driven by the Second Defendant, Fabrice Aissav.

Facts

2. On 16th January 2015 Abel Tari drove his Mazda Bus Registration No. B7571 with his wife, Elizabeth Tari and two expatriate tourists to drop them off at Tamanu Beach Resort. Travelling along the Narpow Point Road in a southerly direction the claimant's bus had a collision with the vehicle driven by the second defendant who was travelling in the opposite direction, in a northerly direction. The first defendant's vehicle driven by the second defendant hit the claimant's bus on its left hand side causing extensive damage and serious and permanent injuries to the claimant's left leg. There was a laceration on the left leg and an Intra-articular fracture of the Tibial Plateau and Dislocation of his left knee. There was a skin degloving injury to the right anterior leg. Abel Tari was hospitalised for those injuries. He was examined a year later and his medical report dated 28th October, 2016 showed he still had pain on the



posterior and anterior drawing of the left knee joint which restricted mobility of the joint. His calculated percentage of disability to the affected knee was assessed at 5.6%.

Mrs Elizabeth Tari suffered from shock resulting in pains in her body and loss of sleep for a week. The claimant's bus is totally written off as a result of the accident.

Allegations

3. The Claimants claim the second defendant was negligent in his driving and drove without due care and attention to other road users and causing the collision, having failed to keep a proper look out. The second defendant caused the accident in the course of his duties with the First defendant.

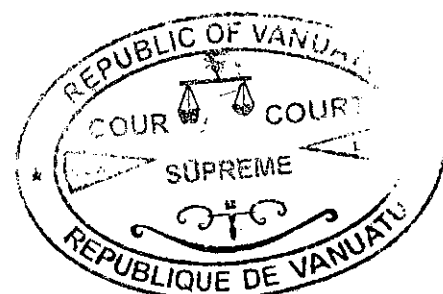
The Reliefs

4. The Claimants claim-
 - a) Monetary compensation for injuries sustained and the pain and suffering felt as a result, for amounts to be assessed,
 - b) Monetary compensation for the value of the claimant's bus now totally written off, for an amount to be assessed.
 - c) Loss of business income and opportunity since date of accident to judgment,
 - d) Damages for negligence,
 - e) General damages to be assessed,
 - f) Special damages to be assessed,
 - g) Interest at 5% per annum, and
 - h) Costs.

Defence

5. The defendants filed a defence on 15th June 2017. They do not contest the claimants claims in paragraphs 1,2 and 3 of their Supreme Court claim filed on 19th May 2017. They however denied the claims in paragraph 4 and the particulars from (i) through (vii).

The defendants say however that it was the Claimant Abel Tari who had caused the collision as a result of his negligent driving, and failing to remain on his legal side of the road. The defendants say the claimant's claims should be dismissed.



Agreed Facts

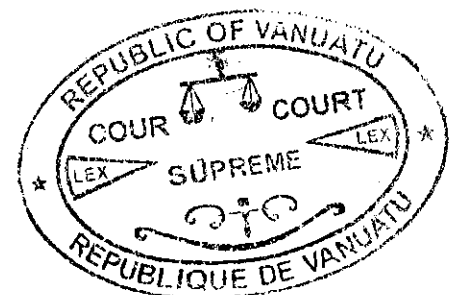
6. The following are the agreed facts between the parties:

- Abel Tari is the registered proprietor of the bus registration No. B7571.
- The First defendant is the registered proprietor of the motor vehicle registration No.13471 and the second defendant was at all material times its employee.
- On 16th January 2015 at approximately 3:45pm the Claimant's bus driven by Abel Tari was travelling on Narpow Point Road near Shark Bay Area and heading towards Tamanu Beach.
- On the same date and time the vehicle driven by the second defendant in the course of his employment with the first defendant, was travelling from the opposite direction on Narpow Point Road and heading towards Port Vila.
- At that time, the bus and the First defendant's vehicle collided at a bend in the road just before the turn off to the Teouma Football Academy on the right side in the direction towards Tamanu Beach.
- At the time of the accident the side of Narpow Point roadway had considerable overgrowth of grass on both sides including before and after where the accident occurred.
- As a result of the accident, the Bus sustained damage to the front and left side and the first defendant's vehicle sustained damage to the front right side.
- Abel Tari required medical attention as a result of the accident.
- An ambulance was called and took Abel Tari to Vila Central Hospital.
- The Police attended at the scene of the accident on 16th January 2015.

Disputed Facts

7. These are the disputed facts:

- The Claimants allege that Abel Tari was driving along his right of way which was on the right side of the road leading to the bend heading towards Tamanu Beach, when the accident occurred.



- The Claimants allege that the second defendant was driving at an excessive speed and as a result was unable to manoeuvre the vehicle he was driving in such a way as to avoid the collision with the Bus.
- The defendants allege that whilst driving the Bus on Narpow Point Road towards Tamanu Beach, Abel Tari was driving on the wrong side of the road to avoid potholes and he collided with the First defendant's vehicle.
- The defendants deny that the second defendant was driving at an excessive speed.
- The defendants allege that the Second Defendant swerved the vehicle he was driving left on the road way to avoid impact with the Bus of the Claimants but he was unable to avoid the collision in the agony of the moment.

The Agreed Issues

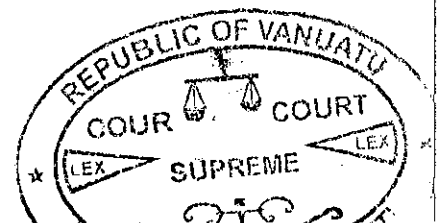
8. The agreed issues by Counsel for the parties are-

- a) Was Abel Tari or the second defendant wholly responsible for the motor vehicle accident that occurred on 16th January 2015 at Narpow Point Road?
- b) If the second defendant was partly responsible for the accident should there be any discount to the quantum of damages to be awarded to Abel Tari by reason of Mr Tari's contributory negligence?
- c) If the answer to the second issue is "yes", what is the percentage of Abel Tari's contributory negligence?

Evidence

9.1. The Claimant's evidence

The first claimant's witness was Timothy Phatu, a Medical Laboratory Scientist and First Aid Instructor working at the Vila Central Hospital since 1990 to date, and close relative of the claimants. Elizabeth Tari called him by phone and informed him about the accident. He left his job and drove to the scene at an estimated speed of 60-70 kms per hour. Did not recall the time. He arrived at the scene and saw only two vehicles there, the Bus and the First defendant's vehicle. There were bystanders there as well. The road is gravelled road, smooth and with no potholes. He took photographs annexed as TP1, TP2, and TP3. In cross this witness said he did not see Christian Jacobe or his truck. He said there were no potholes as he did not avoid any when he drove down. He confirmed the police had arrived after he had arrived at the scene and were present at the scene when he



took photographs of the vehicles and the damage sustained by the Bus and Abel Tari as driver of the Bus.

He confirmed the vehicle's positions in the photograph "TP1" shows the actual position at the time of impact and collision. He confirmed Christian Jacobe was not at the scene when he arrived.

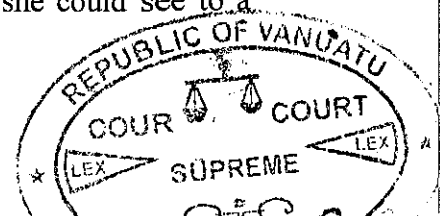
Objections were raised to parts of paragraphs 11, 12, 14, 15 and 16 of his sworn statement dated 28th August 2017. The parts objected to were not admitted including the whole of paragraph 16. The remaining parts were admitted into evidence as Exhibit C1.

9.2. Abel Tari was the second witness for the claimants. Objections were made to his first sworn statement dated 1st June 2016. Paragraphs 5, 22, Annexures "AT5" and "AT9 (1)". The Court disallowed the relevant parts objected to including Annexures "AT5", "AT9" and "AT 14". The statement was admitted as Exhibit C2. Objections were made also to his response statement of 4th August 2017 in paragraphs 6, 8, 9, 11, 12, 13 and 14. The objections to paragraphs 6,8 and 9 were overruled. The objections to paragraphs 11, 12, 13 and 14 were allowed and those relevant parts were not admitted. The statement was therefore admitted as Exhibit C3.

In cross, Mr Tari said the accident occurred between 3:30 to 4:30pm. The road is gravel road. There were tall grasses on the right side only and with trees on his left side. The accident occurred at a bend where he only saw the First defendant's vehicle at a distance of 5 metres away. He said one cannot see further than that at the corner but beyond that bend, one could see beyond to a distance of 10-15 metres. He denied being on the wrong side of the road. He did not agree there were potholes. He was shown the photographs and asked if he could see any potholes and stones on the road and he said he did not see any. He was shown photograph "TP1" and asked if he agreed that was the original position of both vehicles after the collision and he agreed. He agreed the vehicle driven by the second defendant tried to swerve to his side. He denied driving on the wrong side of the road to avoid pot-holes and said there was no one driving behind him at the time. He said Christian Jacobe arrived a little later after the accident when others had come onto the scene. He estimated it was 30 minutes later. He confirmed Timothy Phatu was the first person who arrived on the scene. He confirmed in cross he drove at 20-25kms per hour but not to avoid potholes.

9.3. Elizabeth Tari was the third witness. Her sworn statements of 2nd June 2017 was objected to by defence counsel from paragraphs 3, 4, 5 and 6. The Court overruled the objections in relation to paragraphs 3, 4, 5 and 6. Her response statement dated 4th August 2017 was objected to in paragraphs 3, 8 and 9. The Court overruled the objection in relation to paragraph 3 but allowed objections to parts of paragraphs 8 and 9. Those remaining parts of the statements were tendered into evidence for the Claimants as Exhibits C4 and C5.

In cross she confirmed there were tall grasses only on the right side where the second defendant was supposed to travel on. She confirmed from the bend she could see to a

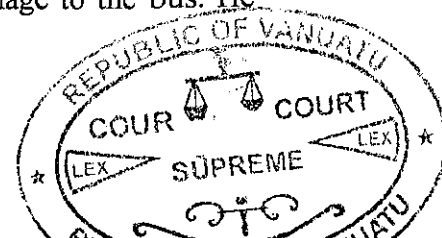


distance of only 5 metres and after the corner, she could see up to 10 metres. She confirmed the road is gravel road and that it had no potholes. She confirmed her husband drove slowly because he wanted to show care for his guests and for the bus. She categorically denied her husband was driving on the wrong side of the road and the proposition that he did so to avoid potholes. She was shown the photographs "PT1", "PT2", and "PT3" and asked if she saw stones and potholes and told the Court there were no stones or potholes. She did not see a Hilux vehicle following behind their bus. She confirmed seeing Christian Jacobe come to the scene afterwards but that Timothy Phatu arrived on the scene first. She agreed Christian Jacobe gave them water to drink but after Timothy Phatu had arrived earlier than he did.

The Defence Evidence

10.1 The first witness was Christian Jacobe. He confirmed his sworn statement dated 19th July 2017 which was tendered into evidence without objection as Exhibit D1. In cross, he said he was the first to arrive on the scene and helped remove the tourists from the bus. He said he followed the bus closely. He agreed there were tall grasses and potholes and that Abel Tari was avoiding potholes. He had swerved to the right when TVL truck arrived suddenly and the collision occurred. He saw Elizabeth Tari had come out of the bus and he went to assist. He said he uses the road about 4 times every day except on Sundays. He said he sometimes drives fast at 60-70kms per hour. He agreed the road was not too good. He agreed the corner was dangerous and agreed if he was driving at over 100 kms per hour he would cut corner and take much of the other side of the road. He agreed he did not see the collision and that was because of the corner. He said he left the scene again after he had assisted and before the police and the ambulance arrived. He confirmed the position of the vehicles after the collision in photographs "TP1", "TP2", and "TP3". He agreed it was the scene of the accident. He agreed the Toyota vehicle is heavier than the Bus. He said there were potholes, that some were big and some were small. He said he was the first person who arrived at the scene but his focus was mainly on the injured persons and not on who else was at the scene at his arrival.

10.2 The second witness was Fabrice Aissav, second defendant. He confirmed his sworn statement dated 23rd June 2017 without objection and tendered it as Exhibit D2. In cross, he was the driver of the first defendant's vehicle. He was returning from Rentapau where he had dropped off staff. He was alone. He saw the bus only at distance of 5 metres because of a sharp bend and wildcane. He agreed he drove at 60-70kms per hour but that he slowed down a little at the bend. He maintained he drove only on his right (legal) side of the road. He agreed with the positions of the vehicles as indicated in photographs "TP1", "TP2", and "TP3". He agreed the weight of the Toyota vehicle he drove is heavier than the Bus's weight. He agreed that the position of the bus was due to the impact caused by the speed of the vehicle he drove. He agreed his vehicle suffered only minor damage to its right (passenger) side because it was protected by a bumper. He agreed to hitting the bus on its front left and causing extensive damage to the bus. He



explained he had to swerve to his left side and did not apply brakes and that if he did, he would have hit the right side of the bus. He agreed he swerved to escape being injured himself. He agreed to the proposition that if the bus had blocked or used his right of way, the collision would have occurred in the middle or head-on and he too would have been injured. He agreed to photograph "PT1" showing the position of his rear wheels at the time of the accident. He agreed to the proposition that when he swung his vehicle, only the front wheels respond and not the rear wheels. He was shown photographs "PT1" and asked if there were potholes and he said he did not see any. Then he said there were potholes as he drove a big truck he could not see and feel any effect of them. He did not agree he has a habit of driving fast. He agreed he had had an accident previously and that was due to the fact he drove too fast. He agreed after the accident there were only Abel Tari, Elizabeth Tari, 2 tourists and himself being at the scene. He recalled Elizabeth Tari arguing with him and pleading with him to help them out. He said he was shocked at the time and did not have a clear mind to remember who arrived first at the scene.

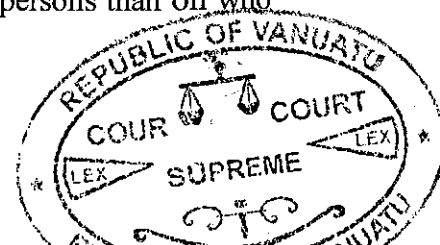
The third witness was to have been Inspector Krem Bihu but Mr Molbaleh objected to the admissibility of his sworn statement and its annexures. The Court accepted the objection and disallowed the whole statement of Inspector Bihu filed on 30th June 2017.

Discussions and Considerations

11.1.I discuss and consider first the evidence of Timothy Phatu and Chistian Jacobe. As far as the accident or collision is concerned, neither of those two witnesses saw the collision. Their evidence is perhaps only relevant to the side issues of who arrived at the scene first in time and whether or not there were potholes on the road at the corner or bend the accident occurred. Christian Jacobe's evidence is also relevant to whether or not Abel Tari had swerved his bus to his right side avoiding potholes, resulting in the accident and thus contributing to its occurring.

11.2.Regarding potholes the photographs "PT1" " PT2" and " PT3" do not show potholes. They do show little stones or pebbles which to me indicate the potholes were filled up previously. It is possible there existed some potholes but they were little as Christian Jacobe confirmed in his evidence in cross that " some were little". I do not accept there were big and deep potholes on the road and at the bend where the accident occurred. If there were, the photographs would have shown them particularly in " TP1" where the right side of the road is very clear but no potholes can be seen. From PT2 and PT3 it is clear the holes were filled up leaving the pebbles visible to the eye.

11.3.As to which of these 2 witnesses got to the scene first in time it is more probable that Christian Jacobe got there first, assisted and left the scene. Elizabeth Tari and Abel Tari were clearly in shock as well as Fabrice Aissav. And their recollection of who arrived first may not be comfortably and readily be acceptable. Both Timothy Phatu and Christian Jacobe placed all their focus and attention on the injured persons than on who



were around them. But assuming that it was Christian Jacobe who had driven behind the bus, it is logical that it was he who arrived first at the scene of the accident. But the Court is cautious about Mr Jacobe's evidence. Why did he have to leave the scene early at such a time? He did not specify the reason. And what is more, Mr Aissav did not even see or notice his presence.

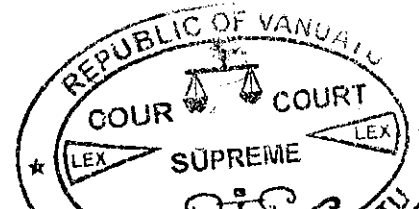
11.4. As to whether or not Abel Tari had swerved his bus to the right side avoiding potholes, the Court is again cautious about the truth of Christian Jacob's evidence. He agreed and confirmed he did not see the collision because of the corner or the bend. If he did not see the accident, then how could it be true that he saw Abel Tari swerve or swing his bus to the right to avoid potholes? I have already found there were no deep or large potholes as such and therefore it could not possibly be true or correct that Abel Tari had swerved his bus to the right in Fabrice Aissav's way.

11.5. Next, Christian Jacobe said he had followed Abel Tari's bus but he did not say how closely and at what speed he was driving at the time. If indeed he was driving closely at the speed of 60-70 kms per hour which he said sometimes he did, it is highly possible at the corner he too would have collided with Abel Tari's bus at the back due to the accident. So it is seen clearly his oral evidence is clearly contradictory to his documentary evidence and as such it is unsafe to rely on such an evidence.

11.6. Putting the evidence of Timothy Phatu and Christian Jacobe aside, what we have remaining is the evidence of the claimants Abel Tari and Elizabeth Tari against the evidence of Fabrice Aissav. Their evidence in summary are as follows-

- a) As to speed, Abel Tari's evidence is that he travelled at low speed at 20-25 kms per hour. He estimated Fabrice Aissav's speed to be at 70-75 kms per hour. Elizabeth Tari confirms Abel Tari's evidence of slow speed to protect his guests and the bus.
- b) Fabrice Aissav admitted clearly he would have been doing between 60-70 km per hour but slowed down to between 50-60 kms per hour at the bend or corner where the collision occurred.
- c) As to whether or not Abel Tari swerved his bus to the right to block Fabrice Aissav's way, Mr Tari's evidence is that he kept to his left. Elizabeth Tari confirmed that evidence. Fabrice Aissav's evidence is that Abel Tari swerved to his right so he had to swerve to his left to avoid a head-on collision.

11.7. The Court prefers the evidence of the claimants as credible. The photograph "PT1" speaks louder and clear for itself to confirm the claimants' version as the most credible version. "TP1" shows the first defendant's vehicle's rear wheels where and when the collision and impact occurred. It places the First defendant's vehicle on the left side of the road in Abel Tari's right of way. "TP1" shows at right (towards the tall grasses) there is still more than enough space to Fabrice Aissav to manoeuvre his vehicle had he



kept to his right of way. The space indicates clearly he did not keep to his legal right of way. And the only reason he did not is that he was travelling at 50-60 kms per hour at a dangerous bend or corner. It indicates he had cut corners. He knew it was a corner. He said tall grasses had blocked his view. Despite all that, he still travelled at 50-60kms per hour. PT1 also shows the front of the First defendant's vehicle front wheels had gone over the edge of the road way into part of the bushes. That also clearly indicates Fabrice Aissav was travelling well over and onto the legal right of way of Abel Tari's bus. "PT2" shows the left rear wheel of Abel Tari's bus at the time of impact. That position indicates clearly the position of the bus before the impact. It concludes the bus was travelling on its legal side (left) of the road.

The Law

13.1. Section 4, subsection 1 of the Road Traffic (Control) Act CAP.29 states:

" 4. Vehicle to be driven on right hand side of road

Every driver must at all times keep his vehicle to the right hand side of the road (particularly so when another road user arrives from the opposite direction or is ready to overtake)." (emphasis added)

13.2. Section 15 provides for speed limit as follows:

" Notwithstanding any other provisions of this Act, it shall be unlawful to drive any motor-vehicle exceeding 2 tons in weight at a speed exceeding 35 kilometres per hour on any road within the town limits of Port Vila and Luganville or at a speed exceeding 60 kilometres per hour on any other road." (emphasis added)

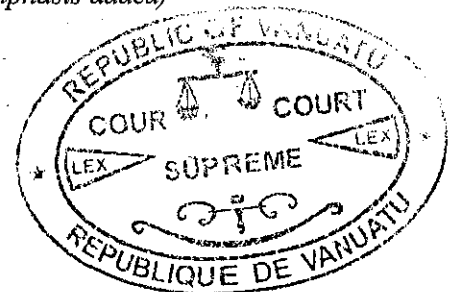
13.3. Section 14 of the Road Traffic (Control) Act provides for careless Driving as follows:

" A person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable on conviction to a fine not exceeding VT 50,000 or to imprisonment for a term not exceeding 6 months or to both." (emphasis added)

13.4. Section 6 of the Penal Code Act CAP.135 provides for criminal intent and recklessness.

Subsection (4) states:

"A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise." (emphasis added)



13.5. The common law position is well established in the dictum of Lord Atkin way back in 1932 in the case of Donoghue.v. Stevenson (1932) A.C.562, H.L at p.580 when he said:

"the rule that you are to love your neighbour becomes a law, you must not injure your neighbour, and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to acts or omissions which are called in question..."
(emphasis added).

13.6. Two years later in 1934 Lord Wright in the case of Lochgelly Iron & Coal Co. v. M' Mullan [1934] A.C 1, H.L at p.25 said:

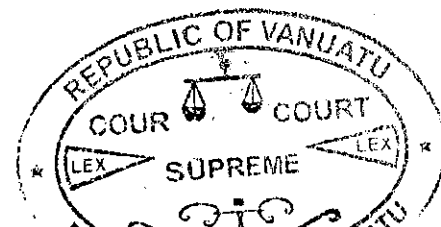
"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owing."
(emphasis added).

13.7. As early as 1856 Alderson B in Blyth.v. Birmingham Waterworks (1856) 11 Ex 781, 784 defined "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of hum affairs, would do: or doing something which a prudent and reasonable man would not do."

Applying the Law to the Facts

14. Applying these legal principles to the facts as agreed and proved as evidence on the balance of probabilities, I make the following findings-

- a) Who owed a duty of care in this case? The obvious answer is the person who was driving at 60-70 kms per hour and slowing down to 50-60kms per hour at a dangerous bend or corner. And that person is Fabrice Aissav, the second defendant.
- b) Was Fabrice Aissav negligent? He knew it was a bend. The tall grasses blocked his view. Yet due to his high speed he cut the corner onto Abel Tari's right of way. He was heedless and careless. He was negligent in both his action and omission. The proximity between the parties at that corner was 5 metres. While Abel Tari slowed down to 25-30kms, Fabrice slowed down from 60-70 kms to 50-60kms, still a dangerously high speed at that particular corner. Clearly Fabrice Aissav was negligent.
- c) Did Fabrice Aissav reasonably foresee the likelihood of injury to Abel Tari and his bus through his actions or omissions? Again he knew it was a bend with tall grasses blocking his view. Yet he did not slow down to lower than 50kms per hour. He therefore

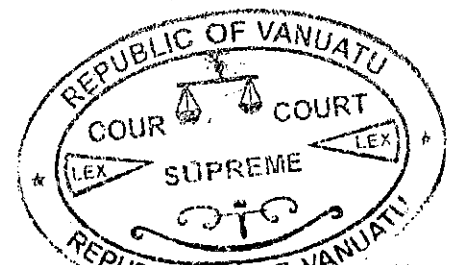


failed to foresee the likelihood of his actions. He was therefore not a reasonable person he should have been in the circumstances. His past criminal record in criminal case No. 3083 of 2016 Public Prosecutor.v. Fabrice Aissav shows he was convicted and sentenced for causing death by reckless driving on 1st January 2013. He drove under the influence of liquor and drove too fast at a corner, taking risks without any regard for the lives of his passengers. He drove a vehicle belonging to Unelco at the time. He was convicted on 3rd November 2016. In a space of 2 years and 16 days, he caused this second accident occurring again at a dangerous corner and at high speed. Clearly Fabrice Aissav failed the test of reasonable foreseeability. And he breached his duty as such. He chose to be an enemy than be a neighbour. He maintained a hard line attitude. That is why he never said sorry or made any attempts to reconcile in the Vanuatu way at any time as revealed through his evidence in cross.

- d) Did Fabrice Aissav cause any damage to his neighbour? The answer is obvious. Photographs “PT3” and “AT2” show extensive damage to the bus of Abel Tari. And photograph “AT3” shows injuries to Abel Tari’s left knee and leg, and right leg.

Submissions

15. Mr Hurley made lengthy written submissions arguing in relation to-
- a) Was Abel Tari or the second defendant wholly responsible for the accident? That AbelTari was wholly to be responsible.
 - b) Whether there was contributory negligence by Abel Tari? That there was contributory negligence.
 - c) What percentage should be discounted for the contributing negligence? That 70% should be attributed to Abel Tari.
16. The defendant relied on the case authorities of Coconut Oil Production (Vanuatu) Limited.v. Terry [2007] VUCA 17, the Fijian case of Kahn.v. Ketty [2017] FJHC in support of the “ *agony of the moment*” principle and Froom.v. Butcher[1976] 1 QB 286 in support of the contributory negligence argument.
17. Paragraph 17 of the Terry case is against the defendant’s case. The Fijian case of Kahn is distinguished in that that was a first time and one-off case. For Fabrice Aissav this was his second vital accident. He had driven this road undoubtedly many times over and therefore he could not rely on the doctrine of ‘agony of the moment’ as his shield to defend him for his negligent acts or omissions. To allow him protection would tantamount to allowing drivers to become ignorant of the traffic laws of the land. Ignorance of the law can never be an excuse for breaking the laws and Courts should never excuse or condone such ignorance as a shield.



18. I therefore reject all the submissions of the defendants and answer the issues raised in paragraph 8 of this judgment as follows:-

- a) I find that Fabrice Aissav is solely and wholly responsible for the accident that occurred at Narpow Point Road on 16th January 2015.
- b) The second defendant being solely and wholly responsible for the accident, there is no discount for any contributory negligence. Fabrice Aissav is 100% liable for the damage and injuries caused to the claimants.
- c) I find no contributory negligence on the part of Abel Tari.

The Result

19. The claimants have proven their claims on the balance of probabilities, and I enter judgment in their favour as to liability against the First and Second Defendants jointly and severally.

20. I adjourn the matter for assessment of amounts of damages.

DATED at Port Vila this 26th day of September, 2017

BY THE COURT


OLIVER A. SAKSAK

Judge

